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Nos. 6 and 7

# In the Supreme Court of the United States

OCTOBER TERM, 1935

COMPAGNIE GENERALE TRANSATLANTIQUE, PETITIONER

*v.*

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK

HAMBURG-AMERICAN LINE, PETITIONER

*v.*

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT

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## BRIEF FOR THE RESPONDENT

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### OPINIONS BELOW

The oral opinions of the District Court are not reported (No. 6, R. 12–16; No. 7, R. 7). The opinion of the Circuit Court of Appeals for the Second Circuit (No. 6, R. 31–32; No. 7, R. 21–23) is reported in 74 F. (2d) 209.

## JURISDICTION

The judgments of the Circuit Court of Appeals were entered December 17, 1934 (No. 6, R. 33; No. 7, R. 23). The petition for writs of certiorari was filed March 15, 1935, and was granted April 29, 1935 (No. 6, R. 35; No. 7, R. 25). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether service on the Commander and the Fourth Officer of the S. S. *Ile de France* and the Chief Officer of the S. S. *Milwaukee* of notices to detain alien seamen on board, addressed to the owners of the vessels, among others, was sufficient compliance with Section 20 (a) of the Immigration Act of 1924 and Rule 7, Subdivision H, paragraph 2, of the Immigration Rules of January 1, 1930, to charge the owners of these vessels with liability to fine for failure to detain alien seamen on board as required by the immigration officers.

2. Whether service on the owners of these vessels, the petitioners here, of notices of liability to fine, which described the owners as agents, was sufficient compliance with Section 20 (a) of the Immigration Act of 1924 and with Rule 7, Subdivision H, paragraph 2, and Rule 23, Subdivision B, of the Immigration Rules of January 1, 1930, the owners having acknowledged service of the notices, appeared before the Board of Review and opposed the imposition of the fines.

## STATUTE AND REGULATIONS INVOLVED

The applicable portions of the statute and regulations involved are set forth in the Appendix, *infra,* pp. 28–32.

## STATEMENT

The facts as disclosed by the record in the Compagnie Generale Transatlantique case (No. 6, R. 2–28) may be summarized as follows:

Compagnie Generale Transatlantique, a foreign corporation, is the owner and operator of the SS *Ile de France* (R. 2), which vessel arrived at the port of New York on or about February 6, 1930, having on board alien seamen (R. 3). A United States immigration officer thereupon boarded the vessel and inspected the crew (R. 3). It not having been established to his satisfaction that 102 alien members of the crew had no intention of abandoning their calling as seamen, and it appearing that they were not on the visa crew list (R. 18), the immigration officer issued a notice directing the owner, among others, to detain such alien seamen on board (R. 17), and served it on the Commander,[1] and also upon the Fourth Officer of the vessel (R. 18). Two of these alien seamen, whose detention on board had been ordered, escaped from the vessel

[1] The complaint filed in the District Court alleged: "5. * * *; that on the vessel's arrival it was boarded by *a representative of the United States Immigration Service who directed the master to detain this seaman* and 101 other members of the crew * * *." (No. 6, R. 3.) (Italics supplied.)

(R. 3–5), illegally entered the United States, and were not on board the vessel when it sailed on February 7, 1930 (R. 21).

The French Line,[2] owner of the vessel (R. 2), was accordingly served with notice of liability to fine in the amount of $2,000 under the provisions of Sections 19 and 20 of the Immigration Act of 1924. In this notice, the French Line (the petitioner) was addressed as the agent of the vessel (R. 21–22). Thereupon it appeared by its attorney (R. 22–23) and objected to the imposition of the fine for reasons assigned in its protest (R. 24–26).

On May 17, 1930, this case came before the Board of Review in fine proceedings (R. 26). Pursuant to the recommendation of that Board, a fine of $2,000 was imposed (R. 26–27). The petitioner, in order to obtain clearance of the vessel, paid to the respondent, under protest, the sum of $2,000 (R. 4, 6).

Thereafter, the petitioner brought suit in the District Court of the United States for the Southern District of New York to recover the fine imposed (R. 2). The case was submitted to the court upon the pleadings and one exhibit, the Department of Labor file (R. 10–12), and both sides moved for a directed verdict (R. 16). The court directed a verdict for the respondent (R. 16), and judgment was

[2] Counsel for this petitioner stated in the District Court that the French Line was the plaintiff (petitioner) in this action (No. 6, R. 12).

entered dismissing the complaint on the merits (R. 9–10). On appeal, the Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court (R. 33).

The facts as disclosed by the record in the Hamburg American Line case (No. 7 R. 2–17) are substantially as follows:

The petitioner, Hamburg-American Line, a foreign corporation, is the owner and operator of the S. S. *Milwaukee* (R. 2), which vessel arrived at the port of New York on or about April 15, 1930, having on board alien seamen (R. 2). A United States immigration officer thereupon boarded the vessel and inspected the crew (R. 3). It not having been established to his satisfaction that one alien member of the crew had no intention of abandoning his calling as a seaman, the immigration officer issued a notice directing the owner, among others, to detain that seaman on board, and served it on the Chief Officer of the vessel (R. 2, 3, 11). In compliance with such notice, the master detained the seaman on board the vessel until "the said seaman subsequently left the vessel" or escaped (R. 3, 9–10). On April 19, 1930, the master of the S. S. *Milwaukee* stated that upon the order of the Hamburg-American Line the alien seaman had been kept on board, and that a watchman of the Hamburg-American Line pier police was detailed to hold him in custody. The alien was locked up in the isolation hospital, a watchman posted in front of the door, and the keys

given into his hands. Around two o'clock in the morning, the quartermaster reported to the third mate that the alien had escaped, and an immediate search revealed the fact that although the watchman was at his post in front of the locked door, the hospital was empty (R. 9–10). The alien seaman, whose detention on board had been ordered, was not on board the vessel when it sailed on April 19, 1930 (R. 9).

The Hamburg-American Line, owner of the vessel (R. 2), was accordingly served with notice of liability to fine in the amount of $1,000 under the provisions of Sections 19 and 20 of the Immigration Act of 1924. In this notice, the Hamburg-American Line (the petitioner) was addressed as the agent of the vessel (R. 11–12). Thereupon it appeared by its attorney and objected to the imposition of the fine (R. 12–14) on the sole ground that notice to detain had been served on the Chief Officer but not on the Master.

On October 10, 1930, this case came before the Board of Review in fine proceedings (R. 14–15). On February 13, 1931, pursuant to the recommendation of that Board, a fine of $1,000 was imposed (R. 16–17). The petitioner, in order to obtain clearance of the vessel, paid to the respondent, under protest, the sum of $1,000 (R. 3).

Thereafter, the petitioner brought suit in the District Court of the United States for the Southern District of New York to recover the fine im-

posed (R. 2–4). The case was submitted to the court upon the pleadings and one exhibit, the Department of Labor file, and both parties moved for a directed verdict (R. 7). The court directed a verdict for the respondent (R. 7), and judgment was entered dismissing the complaint on the merits (R. 5–6). On appeal, the Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court (R. 23).

## SUMMARY OF ARGUMENT

1. The statute imposes an obligation on the owner of any vessel arriving in the United States from a place outside thereof to detain alien seamen on board until they have been inspected and to continue this detention after inspection if required to do so by the immigration officer. The statute employes the word "required", which, of course, means that in some manner the order of detention must be brought home to the party to be charged. The immigration rules alone, however, determine the form of notice and the manner of service. The petitioners brought to the Port of New York three alien seamen who were ordered detained but who subsequently escaped and did not sail with their vessels. In the case of Compagnie Generale Transatlantique, service of the notice to detain was made on the Commander of the vessel, as well as on the Fourth Officer. In the Hamburg-American

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Line case service was made on the Chief Officer of the vessel. In the Compagnie Generale Transatlantique case, the complaint filed by the petitioner in the court below stated that the notice to detain was served on the master of the vessel (R. 3, 5), but in any event, there was no evidence that service was not made in the case of each vessel upon the acting master thereof. No evidence having been presented by the petitioners that the service was not made upon the acting masters, and in view of the presumption of regularity which attaches to the acts of public officials, the court below was correct in concluding, as a matter of fact, that the officers served were actually in charge of the vessels. The master of a vessel is the agent of the owner. Service on the master of a vessel of a notice to detain alien seamen on board is sufficient to charge the owner with liability for failure to detain such alien seamen on board as required. The notices to detain on board were directed to the owners and were served on the masters or acting masters of the vessels. The record does not disclose, what, if any, steps were taken to detain the seamen in the Compagnie Generale Transatlantique case, but it appears in the Hamburg-American Line case that the notice was brought home to the owner and its pier police were employed to detain the alien on board. In these circumstances, we submit that service of a notice to detain alien seamen, addressed to the owner of the vessel and

served upon the master or the acting master, is sufficient compliance with the statute and immigration rules.

2. The petitioners further contend that the fines were unlawfully imposed for the reason that they were not served with notices of liability to fine. The statute does not contain any requirement for service of such notice, but the immigration rules contemplate that if the owner is to be held for the fines he shall be so notified. Notices of liability to fine were served on the petitioners, but they were described in the notices as agents, and not owners. Each of the petitioners actually acknowledged service of the notice, appeared and objected to the imposition of the fines, and were parties to the proceedings. If the petitioners were required to detain the alien seamen on board, they are not entitled to recover the fines imposed because of subsequent irregularities which did not involve the denial of due process.

The instant suits are against the respondent individually for money had and received, and are equitable in their nature. The petitioners, therefore, should not be entitled to recover unless equity and good conscience call for the return of the money. The petitioners violated the duty imposed on them by the statute, became subject to fines, and are not entitled in equity and good conscience to recover.

3. The cases relied on by the petitioners are not contrary to the decisions below.

## ARGUMENT

### I

### SERVICE ON THE COMMANDER AND THE FOURTH OFFICER OF THE SS ILE DE FRANCE AND ON THE CHIEF OFFICER OF THE SS MILWAUKEE OF NOTICES DIRECTING THE OWNERS OF THESE VESSELS TO DETAIN ALIEN SEAMEN ON BOARD CONSTITUTED A SUFFICIENT COMPLIANCE WITH THE STATUTE AND IMMIGRATION RULES TO CHARGE THE OWNERS OF THESE VESSELS WITH LIABILITY TO FINE FOR FAILURE TO DETAIN AS REQUIRED

Section 20 of the Immigration Act of 1924, *infra*, p. 28, imposes an obligation on the owner, charterer, agent, consignee, or master of any vessel arriving in the United States from a place outside thereof, to detain on board all alien seamen employed on the vessel until the immigration officer has inspected such seamen, and to continue the detention of alien seamen after inspection, if required so to do by such immigration officer. This section further provides for the imposition of a fine of $1,000 for each alien seaman with respect to whom this obligation is not observed.

Section 20 finds its origin in Section 32 of the Immigration Act of 1917, c. 29, 39 Stat. 874, 895, which it expressly repealed. Section 32 of the 1917 Act imposed liability only for "negligent failure" to detain, and made a notice in writing to detain " by the immigration officer in charge at the port of arrival" a condition precedent to liability to fine. This section was found inadequate to prevent the

illegal entry into this country of aliens under the guise of seamen.[3] The entire purpose of Section 20 was to provide more effective means to combat such illegal entry. *United States* v. *J. H. Winchester & Co.*, 40 F. (2d) 472, 473 (C. C. A. 2d). The question of negligence and the requirement of "notice in writing" as a condition precedent to liability to the penalty was eliminated. The statute places upon the persons named therein an absolute duty to detain all seamen on board prior to their inspection by the immigration authorities, and con-

[3] Extracts from report of Commissioner General of Immigration to Secretary of Labor contained in the appendix to the annual report of the Secretary of Labor for the fiscal year ended June 30, 1933 (p. 58):

> Seamen: * * * In the past fiscal year, 21,821 vessels were boarded upon arrival from foreign ports, * * * and 822,813 alien seamen underwent immigration examination. Three thousand and seventy were ordered held aboard * * * and 558 were removed to hospitals for treatment. * * * In addition to the alien seamen, 348,996 American citizens were found employed on vessels arriving from foreign ports (mostly American bottoms), but all had to be questioned sufficiently to determine their nationality. In the past, oftentimes as many as half of the crew of vessels of certain flags, passed as bona fide seamen, would desert in port, and when the vessel came to sail the master would sign on none or very few others to replace them, a plain indication that the crew was excessive upon arrival, and a moral certainty that aliens had been signed on for a consideration and with foreknowledge that illegal entry into the United States was planned. This is one of the many "rackets" to circumvent the immigration laws, * * *.

tinues this duty, after inspection, as to such alien seamen as are required to be detained by the immigration authorities.

We think it clear that the effect of the second clause in Section 20 is to release the owner, after inspection of the crew, from the duty of detaining all the alien seamen, but continues the original obligation as to such seamen as are ordered detained by the immigration officer. The statute employs the word "required" in respect of the continued detention. Of course, this means that in some manner the order of detention must be brought home to the party sought to be charged, but the form of such notice and the manner of its service are left entirely to the Secretary of Labor and the Commissioner General of Immigration. Statements by the petitioner to the effect that the statute requires written notice and service thereof in any particular manner are clearly erroneous. It is the immigration rules alone that determine the form of notice and the manner of service.

It is admitted by the petitioners that they are the owners and operators of the vessels which brought to the port of New York three alien seamen, and that these seamen were ordered detained on board after inspection by the immigration officers (No. 6, R. 3, 5; No. 7, R. 2–3). It is also admitted that these three alien seamen escaped, and did not sail with the vessels, and, so far as the

record discloses, are still illegally in the United States (No. 6, R. 3, 5; No. 7, R. 3, 9). In these circumstances, the court below held, correctly we submit, that the petitioners had violated the statute and that the fines were properly imposed for such violations. The petitioners contend, however, that the fines were unlawfully imposed because the notices issued by the immigration officers directing the owners to detain the alien seamen on board the vessels were actually served neither on the masters of the vessels nor on the owners.

In the case of Compagnie Generale Transatlantique, service was made on the Commander of the vessel as well as upon the Fourth Officer. There is no evidence in the record that the Commander of the S. S. *Ile de France* was not the master of the vessel. In its complaint filed in the District Court, the petitioner stated that the master was directed to detain the aliens on board (No. 6, R. 3, 5). In a protest filed with the Board of Review in the fine proceedings, counsel for the petitioner did not even suggest that service was not made upon the master of the vessel. The only place in the record where it is even intimated that the person served was not the master of the vessel is in the statement to that effect made by counsel for the petitioner at the trial, who asserted, without any evidence in support thereof, that service was not made upon the master of the vessel (No. 6, R. 11). In respect of the *Ile de France*, therefore, we submit that, the

petitioner having averred that service was made on the master, and that fact having been admitted in the answer of the respondent (R. 8), it must be conclusively presumed that the Commander was in fact the master of the vessel, and that service was, therefore, made upon the master. But even if the Commander were not actually the master of the vessel, there was no evidence introduced by the petitioner to show that the master was actually on the vessel at the time that the notice to detain was served and that either the Commander or the Fourth Officer was not then actually in charge of the vessel.

This was also the situation in the Hamburg-American Line case in which the notice to detain was served on the Chief Officer of the vessel. The petitioners assert, however, that a person in charge of a vessel in the absence of the master cannot be regarded as the "master" within the meaning of the statute and the immigration rules for the purpose of serving the notice to detain. This contention, we submit, is without merit.

During the absence of the master, the person in charge of a vessel is obviously the acting master, at least so far as the control of the crew is concerned. In the instant cases there is no evidence in the record that the officers served were not in charge of the vessels at the time service was made, or that the masters were actually on board and in charge at such time. It was the duty of the immigration officers to serve the officers who were in charge

of the vessels. The law is well settled that there is a presumption of regularity attaching to the acts of public officials. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14; *Quinlan* v. *Green County,* 205 U. S. 410, 422; *Smith* v. *St. L. & S. W. Ry.,* 181 U. S. 248, 258. If service were made upon a person other than the officer in charge, the burden rested upon the petitioners to present convincing evidence to this effect in order to rebut the presumption of regularity which attaches to the acts of public officials. *Smith* v. *St. L. & S. W. Ry., supra.* All questions of fact and inferences of fact, insofar as supported by substantial evidence, were concluded in favor of the respondent by the findings of the trial court, both parties having moved for a directed verdict. *Williams* v. *Vreeland,* 250 U. S. 295; *Fidelity & Casualty Company of New York* v. *Martin,* 66 F. (2d) 438 (C. C. A. 9th). In the light of the fact that no evidence whatsoever was introduced to show that the masters of the vessels were on board and in charge of the vessels at the time of service of the notices to detain, we submit that the court below was correct in drawing the inference and concluding as a matter of fact that the officers served were actually in charge of the vessels.

That such service sufficiently complies with the statute and the regulations would seem obvious. When a vessel arrives in port, it is, of course, not unusual for the master to go ashore in order to

file the necessary documents or to make required reports to the Collector of Customs. If service of a detention order may not be made upon the officer in charge of the vessel in the absence of the master, enforcement of the Act would be rendered almost impossible. The immigration rules must, of course, be interpreted in a manner which will not do violence to the purpose of the Act. If the contention of the petitioners be correct, it would be impossible, should the master go ashore, secret himself, or otherwise make himself immune to service, properly to enforce the statute.

The requirement that service be made upon the master of the vessel is primarily for the purpose of procuring the detention of the aliens. Unless the officer who is the acting master during the master's absence may lawfully be served, alien seamen might be allowed to land illegally and no one would be chargeable with the duty of detaining them on board. We think it clear, therefore, in the circumstances disclosed in these cases, that the service effected conformed both with the requirements of the statute and with the applicable rule. Moreover, the protest of the attorney for the French Line made no contrary contention in this regard (R. 25), but was put on different ground.

It may further be pointed out that while in the Hamburg-American Line case service of the notice to detain was not actually made upon the master,

it appears from the record that he submitted a report on the escape of the alien seaman involved (R. 9–10), which discloses, as was said by the Circuit Court of Appeals (R. 22), that "he had notice of the order (to detain) long before the alien escaped, and that he acted upon it." This is also supported by the complaint of the petitioner in the District Court in which it stated "that in pursuance of said notice (the notice to detain) the Master of the said S. S. *Milwaukee* did detain the seaman, Abraham Silber, on board the said vessel but in some unknown manner the said seaman subsequently left the vessel" (R. 3).

It is evident that the master felt that he and the owner of his ship were bound by the notice which had been served upon the Chief Officer of the vessel.

The question which is then presented is, whether service of the notice to detain upon the master or acting master of the vessel is sufficient to bind the owner of the vessel when the notice to detain is directed to the owner, as well as the other persons upon whom the duty to detain on board is placed by the statute.

The master of the vessel is the agent of the owner. *American Asiatic Co.* v. *Robert Dollar Co.*, 282 Fed. 743, 749 (C. C. A. 9th); *The Penza*, 9 F. (2d) 527 (C. C. A. 2d); cf. *Suzuki* v. *National Surety Company*, 290 Fed. 942 (C. C. A. 2d). It has been held that service on the master of a notice

to detain alien seamen on board is sufficient to charge the owner with liability for failure to detain such alien seamen on board as required. *British Empire Steam Navigation Co.* v. *Elting,* 74 F. (2d) 204 (C. C. A. 2d), certiorari denied October Term, 1934, No. 761; *United States* v. *J. H. Winchester & Co., Inc.,* 40 F. (2d) 472 (C. C. A. 2d); *United States* v. *Columbus Marine Corp.,* 62 F. (2d) 795 (C. C. A. 2d).

It is obvious that a corporation, which owns a vessel, can only be served with notice to detain on board through the medium of an agent, and if such notice is to be effective, such agent must be on board the vessel. The master is the agent of the owner for all purposes. *The Woodland,* 104 U. S. 180; *The J. P. Donaldson,* 167 U. S. 599.[4] In these circumstances, it would seem clear that the master of the vessel, or, in his absence, the acting master, at least so far as the crew is concerned, is a person through whom service upon the owner may be made.

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[4] Section 37 of the Immigration Act of 1917, c. 29, 39 Stat. 874, 897 (U. S. C., Title 8, Sec. 173), reads in part as follows:

> * * * When construing and enforcing the provisions of this Act, the act, omission, or failure of any director, officer, agent, or employee of any corporation, company, or association acting within the scope of his employment or office shall in every case be deemed to be the act, omission, or failure of such corporation, company, or association, as well as that of the person acting for or in behalf of such corporation, company, or association.

The notices to detain on board in the instant cases were directed to the owners, as well as the other parties charged by the statute with the duty to detain on board. The notice served upon the master of the vessel, while binding upon him individually, inasmuch as he is one of the persons named in the statute, also is binding upon the owner for whom he is the agent. While it does not appear what steps, if any, were taken to detain the seaman in the Compagnie Generale Transatlantique case, it affirmatively appears in the Hamburg-American Line case that the notice was brought home to the owner and that its pier police were employed to detain the alien on board (R. 10).

The obvious intention of the Act would seem to be, in the final analysis, to make the owner, through the medium of the vessel, the guarantor of the payment of any fine irrespective of whom it may be levied against, because the statute provides that if an order to detain on board has been served and such order is not complied with, the vessel shall not be granted clearance pending the determination of the liability to the payment of such fine, or while the fines remain unpaid, unless there be deposited a sum sufficient to cover such fine or a bond with sufficient surety to secure the payment thereof.

We submit, therefore, that service of a notice to detain on board alien seamen when addressed to the owner of a vessel and served either upon the master or the acting master thereof is sufficient to

place the obligation upon such owner to detain the specified aliens on board the vessel, and that a failure to detain such seamen on board subjects the owner to the imposition of the penalty.

## II

### ACTUAL SERVICE ON THE OWNERS OF THE VESSELS OF NOTICES OF LIABILITY TO FINES AND THEIR SUBSEQUENT APPEARANCE AND OBJECTION TO THE IMPOSITION OF THE FINES IS SUFFICIENT COMPLIANCE WITH THE STATUTE AND THE IMMIGRATION RULES

It is also contended by the petitioners that these fines were unlawfully imposed for the reason that they (the owners of the vessels) were not served with notices of liability to fine. The statute does not contain any requirement for service of such notice, but Rule 23, Subdivision B, paragraph 1, of the Immigration Rules of January 1, 1930, *infra*, pp. 30–31, undoubtedly contemplates that if the owner of the vessel is to be held for the fines, notice of liability therefor shall be served upon him, and that he shall be allowed a period of sixty days within which to submit evidence and be heard. See also Rule 7, Subdivision H, paragraph 2, *infra*, pp. 29–30.

In the case of Compagnie Generale Transatlantique, the notice of liability to fine was directed to the French Line as agent of the S. S. *Ile de France* (R. 21). In the Hamburg-American Line case, the notice of liability to fine was directed to the Hamburg-American Line as the agent of the S. S.

*Milwaukee* (R. 11). The fact that these notices described the owners as the agents of the vessels did not affect the validity of the notices.

The Compagnie Generale Transatlantique, one of the petitioners here, is the owner of the S. S. *Ile de France*. While it is contended by this petitioner that no service was made upon it, the record refutes this contention. We do not understand the petitioner to contend that it and the French Line are not identical, but only that a notice addressed to the owner, in which it is described as agent of the vessel, is not actually notice to the owner of the vessel. This petitioner on March 6, 1930, acknowledged service of the notice of liability to fine, requested that the papers be forwarded to the Department of Labor in Washington, and stated that its attorney would appear and present suitable defense (R. 23). At the trial of the case in the District Court, counsel for this petitioner admitted in his oral argument that the petitioner was served with notice.[5] It was also admitted by the

[5] Mr. O'Donnell. The first notice that the French Line received—they are the plaintiffs in this action—was a notice dated February 19, 1930, 13 days after the arrival of the vessel. The notice reads "To the French Line"——

The Court. Wait a minute. That is an additional notice from the one you have been telling me about?

Mr. O'Donnell. Yes; that is the first notice the company received.

The Court. The first notice served on the company itself?

Mr. O'Donnell. On the company itself. Addressed to the French Line, Agent of the vessel "Ile de France", 19 State

petitioner in its complaint filed in the District Court that it had been notified that a fine would be imposed,[6] and that it had duly filed a protest and submitted evidence to show why a fine should not be imposed (R. 3, 6).

The Hamburg-American Line, the other petitioner, is the owner of the S. S. *Milwaukee*. This petitioner, on August 12, 1930, acknowledged service of the notice of liability to fine, requested that the papers be forwarded to the Department of Labor in Washington, and stated that its attorney would appear and present suitable defense (R. 12–13). The Hamburg-American Line in its complaint filed in the District Court admitted that it had received notice of liability to fine.[7]

The fact that both of these petitioners actually acknowledged service of the notices of liability to

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Street, New York City. *It is a notice of intention to impose a $2,000 fine*, not a notice to detain on board. * * *

In response to *the notice of intention to impose a fine*, the company through myself as their attorney, submitted a defense, * * * (No. 6, R. 12.) (Italics supplied.)

[6] 5. * * * That subsequently *the plaintiff was advised by the Commissioner of Immigration at the Port of New York that the ascertained facts indicated that a fine of $1,000.00 should be imposed. The notice* further stated that the plaintiff would be allowed a certain period of time within which to submit evidence to show that such fine should not be imposed. (No. 6, R. 5.) (Italics supplied.)

[7] 8. That thereafter, notwithstanding that the alien was coming to the United States solely in pursuit of his calling as a seaman, *the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed.* (No. 7, R. 3.) (Italics supplied.)

fine, and appeared and objected to the imposition of such fines, is sufficient evidence that the service was made upon the owners of the notices of liability to fine, and that their defenses were presented as a result of such notices. In administrative proceedings of this nature, all that the law requires is that the owner shall have an opportunity to be heard. *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329, 336. In the instant cases, the owners were served with notice of liability to fine, they participated in the hearings to determine whether fines should be imposed, and in all respects were parties to the proceedings. We submit, therefore, that due process was afforded these petitioners and their appearance and submission to the jurisdiction of the Secretary of Labor corrected any defect in the notices, if there were any such defect. *British Empire Steam Navigation Co.* v. *Elting, supra.*

If, as we have hereofore pointed out, the petitioners received such notice as "required" them to detain the alien seamen involved on board the vessels, they clearly are not entitled to recover the fines imposed because of subsequent irregularities which did not involve the denial of due process. They should not therefore be permitted to take advantage of mere technical defects in the form of the notice of liability served upon them or permitted to recover because the Secretary of Labor may have given some erroneous reasons for denying the petitioners' protest against the imposition of the fines.

The instant suits are against the respondent individually for money had and received. *Cosulich Line of Trieste* v. *Elting,* 40 F. (2d) 220 (C. C. A. 2d). Suit against collectors of customs and collectors of internal revenue to recover money paid under protest and duress are of this nature. *Elliott* v. *Swartwout,* 10 Pet. 137; *Bailey* v. *Railroad Co.,* 22 Wall. 604, 638, 639; *Sage* v. *United States,* 250 U. S. 33, 37; *Thomaston Cotton Mills* v. *Rose,* 62 F. (2d) 982 (C. C. A. 5th). These actions being for money had and received are equitable in their character. The petitioners are not entitled to recover unless equity and good conscience call for the return of the money. In the present cases, the petitioners violated the duty imposed upon them by Section 20 (a), and therefore became subject to fines which they are not entitled in equity and good conscience to recover. *Lewis* v. *Reynolds,* 284 U. S. 281; *Crompton & Knowles Loom Works* v. *White,* 65 F. (2d) 132, 133 (C. C. A. 1st); *Thomaston Cotton Mills* v. *Rose, supra; Champ Spring Co.* v. *United States,* 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852.

## III

### THE CASES CITED BY THE PETITIONERS ARE NOT CONTRARY TO THE DECISIONS BELOW

The decision in *Sinclair Navigation Co.* v. *United States,* 32 F. (2d) 90 (C. C. A. 5th), relied on by the petitioners, is based on an entirely different

state of facts. In that case an alien seaman was signed on as a member of the crew at New Orleans for a voyage to Tampico, Mexico, and return. When the vessel returned an immigration officer served an order on the master of the vessel to convey this alien to a hospital for treatment. During the night the alien disappeared from the vessel. A fine was imposed for failure to detain the alien seaman on board. No notice to detain the alien on board the vessel had been served, but only an order directing his removal to the hospital. The court held that the imposition of the fine was erroneous because the master had been directed to transport the alien to the hospital and not to detain the alien seaman on board the vessel.

There is no lack of harmony between the decisions in the instant cases and those of the court below upon which the petitioners rely. In *United States* v. *J. H. Winchester & Co., Inc.*, 40 F. (2d) 472 (C. C. A. 2d), a notice to detain on board was served on the master of the vessel, and notice of liability to fine was served on the local agent of the vessel's owner. The court held that notice to the master of the ship to detain alien seamen was not sufficient notice to the local agent of the vessel to impose the obligation upon such agent to detain the seamen, the master being the agent of the owner only, and that, in the absence of any obligation to detain on board, no liability to fine on the part of the agent arose. In the instant cases, the notices

to detain on board and the notices of liability to fine must be regarded, for the reasons heretofore stated, as having been served on the owners of the vessels. The owners, the petitioners here, appeared in the fine proceedings and opposed the imposition of the fines.

The case of *United States* v. *Columbus Marine Corp.*, 62 F. (2d) 795 (C. C. A. 2d), was decided upon the authority of the *Winchester* case, *supra*. This was also a case where the order to detain on board was served on the master of the vessel and the notice of liability to fine was served on the agent of the vessel. The finding of the court was to the effect that the master was not the agent of the local agent of the vessel, even though he was the agent of the owner, and therefore the local agent could not be held.

In the case of *Lancashire Shipping Co., Ltd.* v. *Elting*, 70 F. (2d) 699 (C. C. A. 2d), notice to detain on board was served on the master, and notice of liability to fine was served on the agent only. The fine was assessed against the agent, who was thereafter reimbursed by the owner. The owner did not appear in the fine proceedings. Upon a suit by the owner to recover the fine, the court held that both a detention order and notice of liability to fine must be served on the party to be charged, and that the fine had been improperly imposed for the reason that the notice to detain was served on the master of the vessel, while the notice of liability to fine

was served on the agent of the vessel's owner and not on the owner. However, in the instant case, the owners acknowledged receipt of the notices of liability, opposed the imposition of the fines, and were parties to the proceedings.

### CONCLUSION

For the reasons stated above, we respectfully submit that the judgments of the Circuit Court of Appeals should be affirmed.

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OCTOBER 1935.

## APPENDIX

The Immigration Act of 1924, c. 190, 43 Stat. 153, 164 (U. S. C., Title 8, Secs. 166, 167), provides in part as follows:

> SEC. 19. No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to such regulations as the Secretary of Labor may prescribe for the ultimate departure, removal, or deportation of such alien from the United States.
>
> SEC. 20. (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance

pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(b) Proof that an alien seaman did not appear upon the outgoing manifest of the vessel on which he arrived in the United States from any place outside thereof, or that he was reported by the master of such vessel as a deserter, shall be prima facie evidence of a failure to detain or deport after requirement by the immigration officer or the Secretary of Labor.

* * * * *

(d) Section 32 of the Immigration Act of 1917 is repealed, but shall remain in force as to all vessels, their owners, agents, consignees, and masters, and as to all seamen, arriving in the United States prior to the enactment of this Act.

IMMIGRATION RULES OF JANUARY 1, 1930

RULE 7. ALIEN SEAMEN

* * * * *

*Subdivision H. Detention and Deportation of Seamen*

PAR. 2. Where, for any cause, the immigration official in charge at any port of arrival finds that any alien employed on board any vessel arriving in the United States from any place outside thereof should be detained on such vessel or deported, he shall forthwith serve or cause to be served on the owner, charterer, agent, consignee, or

master of such vessel a notice in writing to detain or deport such alien, which notice shall set forth the full name of such alien, and in such case an officer of the Immigration Service shall be detailed to verify the departure of such alien; and when such owner, charterer, agent, consignee, or master fails, neglects, or refuses to detain or deport such alien as required, such immigration official in charge shall forthwith serve or cause to be served on such owner, charterer, agent, consignee, or master a notice in writing of the intention to impose the fine provided for by section 20 (a) of the Immigration Act of 1924 for each alien in respect of whom such failure, neglect, or refusal occurs.

RULE 23. IMPOSITION AND COLLECTION OF FINES

*Subdivision B. Service of Notice.*

PARAGRAPH 1. The officer in charge shall serve promptly upon the master, agent, owner, or consignee of the vessel, or other responsible person, a notice to the effect that the ascertained facts indicate that a fine should be imposed under the section of the law involved in the particular case; that he will be allowed 60 days from the date of service of the notice within which to submit evidence and be heard in reference to the matter; and that in the meantime the vessel involved, which is the subject of fine proceedings, will be granted clearance papers upon the condition that he deposit with the collector of customs, prior to the time of sailing, a sum equal to the fine specified in the said notice, such sum to be held as security for the payment of the fine in the event

it should be impcsed (or bond with sufficient surety approved by the collector of customs to secure payment thereof, where such is permitted by the act of May 26, 1924), and, in cases arising under section 9 of the act of February 5, 1917, as amended by the immigration act of 1924, or under section 16 of the immigration act of 1924, a sum equal to that paid by the alien involved for his transportation to this country from the initial point of departure, such latter sum to be held by the collector of customs as a special deposit and to be delivered to the deported alien through the American consul, if fine is imposed; and when such alien is accompanied by another alien who is excluded from admission a further sum equal to that paid by such accompanying alien for his transportation to this country from the initial point of departure, which likewise is to be held by the collector of customs and delivered to the accompanying alien when deportation is effected.

PAR. 2. Such notice shall be prepared in quadruplicate. The original shall be served on the master, agent, owner, or consignee of the vessel either by (a) delivering it to him in person, or (b) leaving it at his office, or, whenever the immigration officer in charge finds either of these methods of service inconvenient, (c) mailing it to him. When service is made by delivery it shall be admitted in writing upon the duplicate and triplicate and the admission witnessed by the server. If admission be refused, or in case of service by either of the other methods, the server shall note the method and date of service on the duplicate and triplicate. The duplicate shall be retained by the immigra-

tion officer in charge. The triplicate shall be delivered to the collector of customs for the district wherein the port of arrival is located, who shall withhold clearance papers until the deposit is made and the quadruplicate shall be forwarded to the bureau when the matter of fine is presented for departmental consideration.

U. S. GOVERNMENT PRINTING OFFICE: 1939